

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

v

MATTHEW LEE SIZEMORE,

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UNPUBLISHED  
January 31, 2003

No. 234420  
Oakland Circuit Court  
LC No. 2000-172198-FC

PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

v

ARNOLD LEE ROARK,

Defendant-Appellant.

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No. 234422  
Oakland Circuit Court  
LC No. 1999-167411-FC

Before: Jansen, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Defendants Matthew Sizemore and Arnold Roark were jointly tried by a jury and were each convicted as charged of two counts of armed robbery, MCL 750.526, arising from a robbery during the consummation of a drug deal. They now appeal as of right.<sup>1</sup> We affirm.

No. 234420

Defendant Sizemore first argues that the trial court committed instructional error by refusing to read ¶ 4 of CJI2d 7.8 to the jury. We disagree. We review claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Contrary to defendant Sizemore's contention, ¶ 4 was not applicable because the record reveals that the complainants' initial descriptions of defendant were consistent with his actual physical

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<sup>1</sup> These cases were consolidated by order of this Court pursuant to MCR 7.211(E)(2).

characteristics. Because the evidence did not support the instruction in question, we find no error.

Next, defendant Sizemore argues that the trial court erred in preventing a defense witness, Luke Coldsworth, from testifying because he violated a sequestration order. We again disagree. The trial court's decision to exclude the testimony of a witness who has violated a sequestration order is reviewed for an abuse of discretion. *People v Nixten*, 160 Mich App 203, 209-210; 408 NW2d 77 (1987). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). The purpose of a sequestration order is to prevent witnesses from coloring their testimony in relation to the testimony of other witnesses. *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). Because Coldsworth was in the courtroom during the trial and because his proffered testimony was related to the testimony of one of the complainants, the very purpose of the sequestration order would have been defeated if he had been allowed to testify. Thus, the trial court did not abuse its discretion when it denied defendant's request to call Coldsworth as a defense witness.

Defendant Sizemore also contends that he was denied his right to due process because the prosecutor knowingly used perjured testimony at trial. Because defendant did not object below on this ground, we review his claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Here, defendant cannot show plain error because there is no indication in the record that the complainants committed perjury.

No. 234422

On appeal, defendant Roark argues that he was denied his right to a fair trial when the trial court refused to hold an evidentiary hearing after defendant's mother, sister, and friend provided affidavits stating that they had observed improper contact between the jury and an investigating police officer. We disagree. The trial court did not refuse to hold a hearing; instead, it stated that before a hearing would be held, the witnesses would have to take polygraph examinations. While defense counsel stated that defendant's mother, sister, and friend were willing to take the examinations, they never took them, and defendant Roark never followed up on his request for a hearing. Thus, defendant Roark abandoned this issue below.

Next, defendant Roark argues that his convictions are against the great weight of the evidence. We disagree. Because defendant Roark failed to make a motion for a new trial on this ground, he did not preserve his claim. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Thus, absent a miscarriage of justice, we need not address this issue. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999).

Defendant Roark bases his argument that his conviction was against the great weight of the evidence on the assertion that the testimony of the complainants was internally inconsistent and inherently incredible. Conflicting testimony and questions regarding the credibility of witnesses are not sufficient grounds for granting a new trial. *People v Lemon*, 456 Mich 625, 643; 576 NW2d 129 (1998). A verdict may be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as

passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1994). In this case the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

Defendant Roark also claims that he was entitled to a mistrial because the unsolicited testimony that defendant had stolen the marijuana to be sold to the complainants was inadmissible "other acts" evidence under MRE 404(b) and because his trial counsel was ineffective for failing to object to this testimony. Because defendant did not raise this issue below, we review it for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. Contrary to defendant Roark's claim, the challenged testimony was not inadmissible under MRE 404(b), as it was part of the "res gestae" of the armed robbery. *People v Castillo*, 82 Mich App 476; 266 NW2d 460 (1987). Further, because defendant's trial counsel is not required to advocate a meritless position, he was not ineffective for failing to object to this testimony. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant Roark claims that he is entitled to a remand to the trial court to correct the presentence report, or for resentencing, because the trial court failed to resolve his objections to the accuracy of his presentence report. We disagree. The record indicates that the trial court resolved defendant's alleged challenges to the presentence report by directing defense counsel to discuss his proposed additions with Roark's probation officer. Defense counsel agreed to do so. Thus, defendant is not "allowed to assign error on appeal to something which his own counsel deemed proper." *People v Milstead*, 250 Mich App 391, 402 n 6; 648 NW2d 648 (2002). In any event, defendant does not question the proportionality of his sentence, and the alleged inaccuracies had no effect on the sentence imposed. Therefore, any error was harmless, and a remand would be a waste of judicial resources. See *People v McAllister*, 241 Mich App 466, 473-474; 616 NW2d 203 (2001).

Affirmed.

/s/ Kathleen Jansen  
/s/ Joel P. Hoekstra  
/s/ Hilda R. Gage